

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON HOWARD CASTRO,

Defendant-Appellant.

UNPUBLISHED

January 15, 2009

No. 279272

Oakland Circuit Court

LC No. 2006-206380-FH

ON RECONSIDERATION

Before: Murphy, P.J., and Sawyer and Smolenski*, JJ.

PER CURIAM.

Defendant appeals as of right his bench conviction of operating a vehicle while either intoxicated or visibly impaired, or with any amount of a schedule one controlled substance in his body, where the vehicle operation causes a serious impairment of a body function of another person. MCL 257.625(5). On appeal, defendant argues that the trial court erred when it permitted the prosecution to amend the information and when it declined to dismiss the case on the ground that his right to a speedy trial had been violated. Because we find no merit to these claims of error, we affirm. This appeal has been decided without oral argument under MCR 7.214(E).

I. Basic Facts and Procedural History

In October 2005, defendant was in a rollover accident. Janis Arsenault, who was a passenger in the truck driven by defendant, was seriously injured in the accident. An officer who responded to the accident testified that he smelled alcohol on defendant's breath and decided to give him a field sobriety test. After defendant failed the test, the officer arrested defendant for driving while intoxicated.

Although defendant was arraigned on the charges in this case in December 2005, he did not proceed to a bench trial until January 2007. At the conclusion of the bench trial, the trial court found defendant guilty of operating a motor vehicle with any amount of a schedule one controlled substance in his system causing serious impairment of body function. Defendant now appeals.

* Smolenski, J., not participating, for the reason he retired from this Court effective 12/31/2008.

II. Amending the Information

A. Standard of Review

We shall first address defendant's argument that the trial court erred when it permitted the prosecution to amend the information to include a new charge before trial. This Court reviews a trial court's decision to permit the amendment of the information for an abuse of discretion. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). A trial court abuses its discretion when it selects an outcome that is not within the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

B. The Information

The prosecution filed the initial information in December 2005. The information alleged that defendant violated MCL 257.625(5). This statute provides that any person who operates a motor vehicle in violation of MCL 257.625(1), (3) or (8) and "by the operation of that motor vehicle causes a serious impairment of a body function of another person" is guilty of a felony. MCL 257.625(5). As the factual predicate for this offense, the prosecution alleged that defendant operated a vehicle on a highway "while under the influence of a controlled substance and/or under the influence of a combination of alcoholic liquor and controlled substance, and by the operation of that vehicle caused a serious impairment of a body function" of another. This language closely matches the provisions of MCL 257.625(1), which prohibits a person from operating a motor vehicle on a highway while "under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance." See MCL 257.625(1)(a). Hence, the initial information appears to allege a violation of MCL 257.625(5) with the underlying factual predicate being a violation of MCL 257.625(1).

On January 5, 2006, the district court held defendant's preliminary examination. At the examination, the prosecution wanted to present two reports concerning defendant's blood tests. The first indicated that defendant had a blood alcohol level of .05 grams per 100 milliliters of blood. The other indicated that defendant had marijuana in his system shortly after the accident. However, the witnesses who were going to authenticate and interpret these reports for the prosecution were not available. For that reason, the district court adjourned the hearing for one week.

The examination continued on January 12, 2006, but the prosecution's witnesses were still unavailable. Nevertheless, the district court continued with the proceeding. Defendant's trial counsel stipulated to the admission of the report on defendant's alcohol level, but refused to stipulate to the report regarding the amount of marijuana found in defendant's blood. As a result, the prosecution was not able to establish that defendant had marijuana in his system at the time of the accident. See MCL 257.625(8) (prohibiting the operation of a motor vehicle with any amount of a schedule one controlled substance in the driver's system). At the close of the examination, the district court concluded that the evidence did not support a finding that defendant was intoxicated within the meaning of MCL 257.625(1), but did find that there was probable cause to believe that defendant operated a vehicle while visibly impaired. See MCL 257.625(3). For that reason, the district court bound defendant over on a violation of MCL 257.625(5) with the underlying factual predicate being a violation of MCL 257.625(3).

In May 2006, the prosecution moved the circuit court to remand the case back to the district court for a continued preliminary examination. The prosecution stated that it wanted the continued preliminary examination in order to establish an evidentiary basis for what the prosecution characterized as an alternate element of the charge. Specifically, the prosecution wanted to establish that defendant had marijuana in his system so that it could prove a violation of MCL 257.625(8) as the underlying factual predicate for a violation of MCL 257.625(5). The circuit court granted the motion and remanded the case to the district court to determine whether defendant had marijuana in his system. On remand, the district court declined to alter defendant's bind over, but did make a finding that defendant had marijuana in his system.

In August 2006, the prosecution moved to amend the information to specifically allege a violation of MCL 257.625(8) as an alternate underlying basis for the charge that defendant violated MCL 257.625(5). The trial court held a hearing on this motion in September 2006. At the hearing, the trial court indicated that it did not agree with defendant's contention that the motion was to add a new charge. Rather, the trial court indicated that it viewed the amended information as alleging the same charge with an alternate factual basis. The trial court permitted the prosecution to amend the information to include a factual allegation that defendant operated the vehicle with marijuana in his system.

C. Amending the Information

On appeal, defendant contends that the trial court did not have the authority to amend the information to include a new charge—a violation of MCL 257.625(8). We do not agree that the amendment at issue added a new charge. Rather, the prosecution always alleged that defendant violated MCL 257.625(5), albeit under various theories. As our Supreme Court has noted for a similar offense, proof that the defendant had the requisite state—that is, operated a vehicle in violation of MCL 257.625(1), (3) or (8)—is merely an element of the offense. See *People v Schaefer*, 473 Mich 418, 433-434; 703 NW2d 774 (2005) (interpreting MCL 257.625(4), which has the same elements as MCL 257.625(5) except that the defendant's operation must have caused a death rather than a serious impairment of a body function). And a change in the factual predicate underlying the charge is not the functional equivalent of bringing a new charge. Further, even if this Court were to conclude that the amendment added a new charge, MCR 6.112(H) clearly provided the trial court with the authority to do just that: "The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant." The court rule does not limit the trial court's ability to amend the information based on the nature of the amendment. Instead, the court rule limits the trial court's ability to amend the information based on the consequences that would follow from the amendment. Hence, under this court rule, a trial court may amend the information to include a new charge. See *McGee*, *supra* at 688-693. Consequently, whether framed as an amendment to the factual predicate underlying the first element of the charged offense, or as the addition of a new charge, the relevant inquiry is whether the amendment unfairly surprised or prejudiced defendant. MCR 6.112(H).

On appeal, defendant asserts that he was prejudiced by the trial court's decision to permit the amendment of the information, but fails to actually state how the amendment prejudiced him. A defendant may not merely assert a claim of error and then leave it to this Court to search for factual or legal support for the claim. See *People v Martin*, 271 Mich App 280, 315; 721 NW2d

815 (2006). Hence, defendant has abandoned this issue on appeal. In any event, we conclude that defendant's claim is without merit.

From the inception of this case, the prosecution charged defendant with a violation of MCL 257.625(5). As an element of this charge, the prosecution had to prove that defendant was intoxicated in violation of MCL 257.625(1), or visibly impaired in violation of MCL 257.625(3), or had any amount of a schedule one controlled substance in his system in violation of MCL 257.625(8). Further, the original information alleged that defendant was under the influence of alcohol or under the influence of alcohol and a controlled substance. Hence, defendant was on notice that the prosecution alleged that he had a controlled substance in his system at the time of the accident. Therefore, the prosecution alleged sufficient facts within the original information to place defendant on notice that a violation of MCL 257.625(1), (3), or (8) could serve as the underlying factual basis for the violation of MCL 257.625(5).

In addition, defendant was clearly aware of the report that indicated that defendant had marijuana in his system shortly after the accident. Indeed, defendant refused to stipulate to its admission at the original preliminary examination and vigorously opposed the prosecution's subsequent efforts to rectify its failure to get the report into evidence at the preliminary examination. Defendant's efforts to capitalize on the prosecution's mistake belie any claim that he was unfairly surprised by the eventual amendment of the information to include an allegation that he had marijuana in his system. And defendant had a significant amount of time to prepare a defense to the claim that he had marijuana in his system. Under these circumstances, we cannot conclude that defendant was prejudiced by the amendment.

The trial court did not abuse its discretion.

III. The 180-day Rule

A. Standard of Review

We shall next address defendant's argument that the trial court erred when it declined to dismiss the charges against him based on a violation of his right to be tried within 180-days under MCL 780.131. This Court reviews for an abuse of discretion a trial court's decision on a motion to dismiss. *People v Stephen*, 262 Mich App 213, 218; 685 NW2d 309 (2004). This Court reviews de novo the proper application and interpretation of a statute. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

B. MCL 780.131

A defendant, who is an inmate of a state correctional facility, has a statutory right to be brought to trial within 180 days after the department of corrections delivers notice to the prosecution of the defendant's place of imprisonment and a request for final disposition of the pending warrant, indictment, information, or complaint. MCL 780.131. In the present case, defendant was incarcerated after his arrest on an unrelated charge. Based on this, defendant contends that the prosecution had to bring him to trial within 180 days after the department of corrections knew or had reason to know about the charges in this case. However, our Supreme Court has held that the 180-day period only begins to run when the department of corrections actually delivers the statutorily required notice and request to the prosecution. *Williams, supra* at

259. In this case, there is no evidence that the prosecution ever received the notice required to trigger the 180-day period.

Defendant acknowledges that the decision in *Williams* appears to foreclose his argument. However, defendant argues that *Williams* does not apply to his case because it was decided while his case was still pending before the trial court. For that reason, he contends that this Court must apply the law as it existed before the decision in *Williams*. We do not agree. Normally, our Supreme Court's opinions are given full retroactive effect. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 205; 747 NW2d 811 (2008). However, in *Williams*, our Supreme Court indicated that its decision would apply with limited retroactive effect, applying to those cases pending on appeal in which the issue had been raised and preserved. *Williams, supra* at 255, 259. Nevertheless, because defendant did not move for dismissal under MCL 780.131 until after the decision in *Williams*, that decision applies to his case. Therefore, the trial court did not err when it declined to dismiss defendant's case based on a violation the 180-day rule.

IV. Speedy Trial

A. Standard of Review

Defendant also argues that the trial court erred when it declined to dismiss his case based on a violation of his constitutional right to a speedy trial. This Court reviews for an abuse of discretion a trial court's decision on a motion to dismiss. *Stephen, supra* at 218. Whether defendant was denied his constitutional right to a speedy trial is a mixed question of fact and law. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). This Court reviews for clear error the trial court's factual findings and reviews de novo the constitutional questions of law. *Id.*

B. The Right to a Speedy Trial

Both the United States Constitution and the Michigan Constitution guarantee a defendant the right to a speedy trial. US Const, Am 6; Const 1963, Art 1, § 20. In examining whether a defendant has been denied the right to a speedy trial, this Court balances the following four factors: "(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *Williams, supra* at 261-262.

In this case, we note that the length of delay, which was about fourteen months from the date of defendant's arraignment to his trial, was not particularly long. See *id.* at 264 (noting that considerably longer delays have been held to not violate a defendant's right to a speedy trial). Further, the reasons for the delay were reasonable and included some delays that were caused by defendant's actions. Likewise, defendant did not assert his right to a speedy trial until approximately six weeks before the scheduled trial date and only three months before the actual trial date. Hence, the critical factor in this case is the fourth factor: the prejudice to the defendant.

When the length of delay is eighteen months or more, prejudice is presumed and the burden shifts to the prosecution to show that there was no injury. *Id.* at 262. However, where, as in this case, the length of delay is less than eighteen months, the defendant bears the burden of proving prejudice. *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003).

There are two types of prejudice that a defendant may experience: prejudice to his person and prejudice to his defense. *Williams, supra* at 264. In this case, defendant argues that he suffered both personal prejudice and prejudice to his defense. Defendant contends that, due to the prosecutor's inexcusable delays, he lost the opportunity to serve his sentence in this case concurrently with the sentence he was serving on an unrelated matter during the lower court proceedings. However, the trial court gave defendant credit against the sentence in this case for the time he served awaiting trial. As such, defendant did not suffer any personal prejudice beyond that which typically follows from being incarcerated. And, because defendant was incarcerated on an unrelated matter, the personal prejudice that normally accompanies incarceration cannot be attributed to the delay in bringing him to trial in this case. See *People v Holtzer*, 255 Mich App 478, 493; 660 NW2d 405 (2003).¹

Defendant also claims that his defense was prejudiced by the delay. Yet defendant does not indicate that he would have approached his defense any differently had he been brought to trial earlier. Indeed, the only result of the delay that defendant can identify is the fact that the prosecution was able to bolster its case during the period of delay. But the fact that the prosecution was able to improve its case is not the equivalent of an impairment of defendant's defense. *Holtzer, supra* at 493. Under the totality of the circumstances, we conclude that the trial court did not abuse its discretion when it refused to dismiss the charges against defendant based on a violation of his right to a speedy trial.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer

Smolenski, J., did not participate.

¹ Defendant did spend a few days in jail after the completion of his sentence on the unrelated matter, but any prejudice was minimal.